STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED March 22, 2005
v	No. 252311 Wayne Circuit Court
DARIO S. CRUZ, Defendant-Appellee.	LC No. 01-007476-01

Before: Judges Talbot, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, twenty-three months' to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

First, defendant argues that the trial court violated his Sixth Amendment right to confront witnesses against him through cross-examination, as set forth in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), when it incorrectly determined Marcus Valentine to be "unavailable" as a witness and allowed his prior testimony to be read before the jury. We disagree.

This Court reviews claims of constitutional error de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004). Issues concerning the proper construction of a rule of evidence present questions of law that this Court also reviews de novo. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). In construing the rules of evidence, this Court applies "'the legal principles that govern the construction and application of statutes.' When the language of an evidentiary rule is unambiguous, we apply the plain meaning of the text 'without further judicial construction or interpretation.'" *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 78; 684 NW2d 296 (2004) (footnotes omitted).

"'Unavailability as a witness' includes situations in which the declarant . . . persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." MRE 804(a)(2). In this case, the parties and the court were on notice that Valentine might refuse to testify at trial because Valentine had equivocated several times in

talking with the prosecutor, and the prosecutor brought this to the court's attention outside the presence of the jury. Later, in front of the jury, the court twice asked Valentine if he was refusing to testify, and Valentine both times said that he was.[1] The court then declared Valentine unavailable as a witness and allowed Valentine's testimony from defendant's first trial to be read before the jury.[2] The meaning of MRE 804(a)(2) is clear. Valentine persisted in refusing to testify despite the court's order to do so and was, therefore, unavailable.

With regard to whether the trial court properly allowed Valentine's prior testimony to be read to the jury, the United States Supreme Court in *Crawford* held that the Confrontation Clause requires that an unavailable witness' prior testimony be under oath and subject to cross-examination before it can be used against a criminal defendant. *Crawford, supra* at 1374. Valentine's prior testimony was given under oath at defendant's first trial and was subject to cross-examination. Where the trial court properly determined that Valentine was unavailable as a witness, no violation of defendant's Confrontation Clause rights occurred because Valentine's prior testimony met the requirements under *Crawford*.

Defendant next argues that the trial court violated defendant's right to present a defense when it refused to allow Officer Cadez to testify regarding an alleged conversation with the victim, at an unspecified time, in which the victim asked Cadez for help getting out of the drug dealing business because he was afraid for his life. We disagree.

A trial court's decision regarding the admission or exclusion of evidence is reviewed for an abuse of discretion. *People v Small*, 467 Mich 259, 261; 650 NW2d 328 (2002). "[A]n abuse of discretion occurs when the lower court's decision is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *People v McSwain*, 259 Mich App 654, 684; 676 NW2d 236 (2003) (citation omitted).

In this case, the prosecutor moved in limine to exclude any mention of the victim's possible drug dealing activity. Defense counsel was asked to make an offer of proof. Defense counsel stated that a pill vile that contained suspected narcotics was found in the victim's possession. This material was apparently never tested. Defense counsel also claimed that, at some point, the victim told Cadez that he wanted to quit the drug business and was afraid for his life, but defense counsel never specified when this conversation occurred in relation to the shooting. Finally, defense counsel argued that the murder was the result of a drive-by shooting,

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[1] Valentine was already incarcerated at the time of trial on an unrelated offense, and thus, the trial court's power to incarcerate Valentine for civil contempt until he would agree to testify was of no value in persuading him to testify.

[2] Defendant did not object to the court declaring Valentine unavailable, but rather, requested a cautionary instruction that the jury should not draw any inference regarding the reason Valentine refused to testify. Although the court did not grant the instruction as requested, it did issue a modified instruction, informing the jury that Valentine was deemed unavailable, that the testimony they would hear was taken under oath at an earlier hearing, and that they should consider it in the same way as any other testimony they heard in court. Defendant did not object to the instruction as given.

with the shots potentially having been fired from a Suburban that some witnesses saw after the shooting.

We cannot say that the trial court abused its discretion in excluding Cadez's testimony. There was simply no evidence that drugs played any part in the shooting. There was evidence that the shooting was a continuation of a fight that occurred earlier that night at the Hockeytown Café. The eyewitness testimony and the physical evidence found at the scene were consistent with the shooter chasing the victim down and shooting him, as opposed to a drive-by shooting from a Suburban that, according to witness Klewitter, did not appear until six minutes after the shooting. There was no testimony that any shots were fired after the Suburban was seen. Furthermore, the victim's toxicology report was negative for the presence of drugs or alcohol in his system. Introducing evidence of alleged drug dealing in all likelihood would have distracted the jury and proven more prejudicial than probative. The trial court did not abuse its discretion in excluding any mention of the victim's alleged drug activity.

Defendant next raises two claims on appeal with regard to the jury selection process. First, defendant argues that the jury venire contained no Hispanic potential jurors and was not representative of the entire county. Second, defendant argues that disparaging racial remarks made by two potential jurors tainted the impartiality of the jurors that were impaneled who overheard the remarks.

A defendant must object or refuse to express satisfaction with the jury to properly preserve a challenge to the jury selection on appeal. *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998). "An expression of satisfaction with a jury at the close of voir dire waives a party's ability to challenge the composition of the jury thereafter impaneled and sworn." *People v Hubbard (After Remand)*, 217 Mich App 459, 466; 552 NW2d 493 (1996). Although defense counsel raised the issue of a lack of Hispanics in the jury pool during voir dire, she later expressly stated her satisfaction with the jury as impaneled. Defendant has, therefore, waived any claim on appeal that make up of the jury was improper. *Id*.

With regard to the racial remarks made by two potential jurors, the court questioned all of the potential jurors, asking if they heard the remarks and, if so, whether those remarks would affect their ability to be impartial in deciding the case. Only two of the potential jurors heard the comments, and each of them said that the remarks would not affect their ability to impartially decide the case. It is presumed that the jurors were being truthful in this regard. *People v King*, 215 Mich App 301, 303; 544 NW2d 765 (1996). Defendant did not move to strike either of these potential jurors, and both were later impaneled. Additionally, neither of the jurors who made the remarks was impaneled. Defense counsel's expression of satisfaction with the jury as impaneled waived defendant's right to challenge on appeal the manner in which voir dire was conducted. *Hubbard, supra* at 466.

Defendant also argues that his trial counsel was constitutionally ineffective based on numerous instances of allegedly unreasonable conduct, thereby entitling him to a new trial. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, whereas questions of law are reviewed

de novo. *Id*. Defendant moved in this Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), but this Court denied the motion, determining that defendant failed to persuade the court of the need to remand at that time. *People v Cruz*, unpublished order of the Court of Appeals, entered July 29, 2004 (Docket No. 252311). This Court's review is, therefore, limited to mistakes apparent from the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant cannot meet his burden of showing that he received ineffective assistance of counsel on any of his claims.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).]

The United States Supreme Court has made clear that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Wiggins v Smith*, 539 US 510, 521; 123 S Ct 2527; 156 L Ed 2d 471 (2003). The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. Moreover, this Court has held that "decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (internal quotations and footnote omitted).

Every instance of alleged ineffective assistance of counsel that defendant raises on appeal is presumed to be a matter of trial strategy. Defendant fails to articulate how any alleged instance of ineffective assistance was unreasonable according to professional norms, other than to repeatedly say that defense counsel made a "big mistake." Defendant's hindsight evaluation of counsel's performance, however, is not the standard to which ineffective assistance of counsel is reviewed. Because defendant has failed to show that counsel's performance fell below an objective standard of reasonableness, further analysis is unnecessary. Defendant's conclusory statements that counsel was ineffective, based on speculation and evidence not contained in the record, are not sufficient to warrant reversal of his convictions.

Defendant next argues that the trial court erred in admitting evidence of a witness' identification of him from a photographic lineup and subsequent in-court identifications, entitling him to a new trial. We disagree. "This Court's review of a lower court's factual findings in a suppression hearing is limited to clear error," but, where, a constitutional due process claim is involved, "we review de novo the lower court's ultimate ruling with regard to the motion to suppress." *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002) (citations omitted).

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "Simply because an identification procedure is suggestive does not mean it is necessarily constitutionally defective." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). "If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *Id*. "The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be view in light of the 'totality of the circumstances.'" *Gray, supra* at 115 (citation omitted).

Factually, there is nothing in the record to suggest the trial court clearly erred in determining that five out of the six people in the photographic lineup could pass for Hispanic. From the record, the photographic array does not appear so impermissibly suggestive as to create a substantial likelihood of misidentification. The trial court, therefore, did not err in refusing to suppress the witness' photographic pretrial identification. Where the initial pretrial identification procedure was not impermissibly suggestive, there is no taint to purge and the trial court did not err in admitting the witness' subsequent in-court identification of defendant.

Defendant next argues that the trial court erred in refusing to allow Jessica Vance to testify regarding a threat allegedly made to her by a Taylor police officer. We disagree. A trial court's decision regarding the admission or exclusion of evidence is reviewed for an abuse of discretion. *Small, supra* at 261.

According to Vance, a Taylor police officer approached her at a gas station and said, "Jessica, right. You keep f---ing around, you'll end up dead." Vance, however, stated that the officer never mentioned defendant and she did not know whether the incident had anything to do with defendant's case. Because there was no established connection between the alleged threat and defendant's case, the threat was not material to any fact of consequence in defendant's trial and likely would have created jury confusion. The trial court did not abuse its discretion in excluding any testimony regarding the threat.

Lastly, defendant argues that the trial court's admission of a prejudicial mug shot for the purpose of showing the jury defendant's skin tone entitles him to a new trial. We disagree. In this case, showing defendant's skin tone with a suntan for identification purposes was a relevant and proper use for the mug shot. The shooting occurred on September 14, 2000, and witnesses described the shooter as "olive skinned." The trial took place in May and early June after defendant had been incarcerated through the winter. Defendant's skin at trial was much lighter than it had been at the end of the summer when the shooting occurred. The only photograph that the prosecutor had of defendant with a suntan was the mug shot used at trial that showed defendant's bare chest, with a tattoo that read "Brown Power," and his boxer shorts showing above the waistband of his pants. The trial court ordered the prosecutor to black out the tattoo and to crop away defendant's underwear before the photograph would be admitted. The trial court obviously balanced the probative value of the photograph against the prejudicial value when it ordered the photograph to be redacted to remove the tattoo and underwear that defense counsel objected to as too gang-oriented. The trial court, therefore, did not abuse its discretion in

admitting the redacted mug shot photograph of defendant into evidence, and defendant is not entitled to a new trial.

Affirmed.

/s/ Michael J. Talbot
/s/ Kathleen Jansen
/s/ Hilda R. Gage